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No. 97-1929

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

STATE OF MONTANA; LAKE COUNTY, MONTANA; CITY OF RONAN, MONTANA, a municipal corporation; TOWN OF HOT SPRINGS, MONTANA, a municipal corporation,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, an agency of the United States; CAROL M. BROWNER, Administrator of the United States Environmental Protection Agency; CONFEDERATED SALISH and KOOTENAI TRIBES OF THE FLATHEAD RESERVATION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND BRIEF OF NATIONAL WATER RESOURCES ASSOCIATION, FLATHEAD JOINT BOARD OF CONTROL OF THE FLATHEAD, MISSION AND JOCKO VALLEY IRRIGATION DISTRICTS, ROSS MIDDLEMIST, WILLIAM SLACK, AND GLEN MURPHY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The National Water Resources Association ("NWRA"), the Flathead Joint Board of Control of the Flathead, Mission, and Jocko Valley Irrigation Districts ("Districts"), Ross Middlemist, William Slack, and Glenn Murphy respectfully move this Court, pursuant to Rule 37 S.Ct. R., for leave to file an *Amicus Curiae* brief in support of Petitioner's Petition for Writ of Certiorari.

The named individuals and the Districts participated in this matter below as *amici*.[1] They attempted to par-

[1] Mr. Wayne Maughan, who participated below, does not request leave to participate here because he has sold his property and moved away from the Flathead reservation.

ticipate as parties, moving the district court for leave to intervene, which it denied. *State of Montana v. U.S. Environmental Protection Agency*, 941 F.Supp. 945, 954-55 (D. Mont. 1996). The individuals own land in fee within the exterior boundaries of the Flathead Reservation in Montana, where they live with their families. They are not members of the Confederated Salish and Kootenai Tribes ("Tribes"), but they and their families consume and use water, just as tribal members do.

Their interest in this litigation lies in the fact that their health and welfare, no less than tribal members' is affected by the quality of water on the reservation and their use of water is affected by the water quality standards applicable to the reservation. If the Tribes have the authority to set these standards, the individuals, as non-members, will have no right to participate in the political process that leads to these standards. In addition, the precedential effect of the lower court's decision will undoubtedly affect other jurisdictional issues, such as whether the Tribes have authority over wetlands and water rights. Each of the individuals own both wetlands and water rights.

Congress authorized the Districts to be formed and operated on the reservation under the laws of Montana. It authorized them to embrace within their boundaries and authorities all fee-owned irrigable lands, including trust allotments once the fee patent has issued. As owners of irrigable land, each of the individual *amici* is a constituent of one of the three Districts. Under Montana law, the Districts' authority includes, *inter alia*, the power to construct and maintain dams and reservoirs and other diversions for irrigation works [2], appropriate water, acquire

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[2] The Court found diversions of water, even for nonconsumptive uses, could be limited because of their impact on water quality standards in *PUD No. 1 v. Washington Department of Ecology*, 511 U.S. 700 (1994).

land, water rights, and water works, enter contracts with the United States, apportion and distribute irrigation water among irrigators, and operate the irrigation project which serves them. *See* Ch. 85, Title 7, Part 19, Montana Code Annotated (1997). The Flathead Joint Board of Control serves as a central operating authority for these Districts and, like the Districts, is a governmental entity under Montana law. § 85-7-1905, MCA.

As local governmental entities of the State the Districts are concerned to prevent the disruption of the direct political relationship, and accountability, between their constituents, the Districts, and the State by the intrusion into this relationship of the Tribal governments' authority.

NWRA is a not-for-profit federation of water resource organizations in sixteen (16) of the seventeen (17) reclamation states. Its membership includes rural water districts, municipal water entities, and other local governments. Many of these members are Publicly Owned Treatment Works ("POTWs"), which receive wastewater from indirect dischargers, treat it, and then discharge it into navigable waters. Consequently, they must meet applicable water quality standards to receive the certification required under § 401 of the CWA. Some of its members are commercial water supply companies and legal and financial institutions concerned with permitting and financing water supply and treatment facilities. Among its members are municipal water supply and waste water treatment agencies, POTWs, and rural water districts located on Indian reservations throughout the West.

NWRA serves its membership by advocating for laws, regulations and policies which promote the efficient use of water in the West. The development of policies and projects to meet future needs requires a degree of certainty about regulatory regimes so that meaningful planning, in terms of legal and financial support for developments as well as engineering, can take place.

Aside from any particular resolution to this controversy, NWRA is strongly interested in having the issue of whether tribes have sovereign authority to set standards for nonmember activity on fee land resolved so that its members can plan accordingly in terms of the political regime they will have to work within, the level of standards they will have to meet, and the capital input that will be necessary, should they decide to proceed with further development.

These organizations and individuals, and their counsel, are familiar with the Indian law issues presented by this case and the legal principles that control them. The Districts have appeared before this Court in past actions seeking a writ of certiorari and in submitting an *amicus curiae* brief in *Strate v. A-1 Contractors*, —— U.S. ——, 117 S.Ct. 1404 (1997).

These *amici* have endeavored in the accompanying brief to assist the Court in evaluating the importance of the issue presented for review by presenting facts and arguments, or perspectives on arguments, not presented by the Petitioners.

Counsel for the State of Montana, City of Ronan, and Town of Hot Springs consented to this filing, as has the Solicitor General. Counsel for Respondent Tribes have not consented to this filing.

Dated this 24th day of August, 1998.

Respectfully submitted,

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BRIEF OF NATIONAL WATER RESOURCES ASSOCIATION, FLATHEAD JOINT BOARD OF CONTROL OF THE FLATHEAD, MISSION AND JOCKO VALLEY IRRIGATION DISTRICTS, ROSS MIDDLEMIST, WILLIAM SLACK, AND GLEN MURPHY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI [1]

The National Water Resources Association ("NWRA"), Flathead Joint Board of Control of the Flathead, Mission,

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[1] Counsel for the parties did not participate in drafting this brief, and no one other than the *amici curiae* made a monetary contribution to its preparation or submission.

and Jocko Valley Irrigation Districts ("Districts"), Ross Middlemist, William Slack, and Glen Murphy, respectfully submit this brief *amici curiae* in support of the Petition for writ of certiorari to the Ninth Circuit Court of Appeals pursuant to S. Ct. R. 37.

INTERESTS OF AMICI CURIAE

A. The Individuals.

The individual *amici* own land in fee within the exterior boundaries of the Flathead Reservation in Montana, where they reside with their families. They are farmers and ranchers. They are not members of the Confederated Salish and Kootenai Tribes ("Tribes"), but they and their families consume and use water, just as tribal members do. Because they are not tribal members, they have no right to participate in tribal government, either by voting or holding office. ("Nonmember Indians and non-Indians share the same relation to tribal government, in that neither group can typically vote in tribal elections, participate in the tribal jury system, nor can they hold tribal office." *Lower Brule Sioux Tribe v. State of South Dakota*, 917 F. Supp. 1434, 1444 (D.S.D. 1996), citing *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. 408, 445 (1989), affirmed, 104 F.3d 1017, 102-1024 (8th Cir. 1997). Nonmembers own land on the Flathead reservation because their predecessors homesteaded and purchased allotments there under the authorization of Congress, which applied the policies of the General Allotment Act ("Dawes Act"), 25 U.S.C. §§ 331, *et seq.*, to the reservation in the Flathead Allotment Act of 1904 ("FAA"). Act of April 23, 1904, 33 Stat. 302.[2] As a result, homesteaders and purchasers of

[2] The demographic consequences of Congress' application of the Dawes Act policies to the Flathead reservation are that nonmembers constitute at least 75% of the reservation population of 21,259 as found in the 1990 census. Nonmembers own almost 50% of the reservation acreage.

allotments who fulfilled applicable requirements obtained fee title and the full value of the land, without any relevant conditions, for example, that their activities on the land would be subject to a tribe's governance. *Montana v. United States*, 450 U.S. 544, 559, n.9 (1981) ("defies reason" Congress would have intended tribes to retain jurisdiction over nonmembers); *Brendale*, 492 U.S. at 437 (concurrence) ("inconceivable" Congress intended tribes to retain jurisdiction over nonmembers).

Their interest arises, specifically, from the fact that the decision below allows the Tribes' government to undertake "core governmental function[s]," Pet. 104a, affecting them and their families—in this case setting the water quality standards applicable to all waters on the reservation—even though, as a limited sovereign generally lacking in powers over nonmembers the Tribes exclude them from exercising fundamental rights of political participation.[3] More generally, their interest arises from the fact

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[3] The importance of this "core governmental function" was recognized by one of EPA's attorneys in this litigation who wrote that setting water quality standards is the foundation on which all other water quality decisions rest and that this governmental action entails political decisions affecting society at large: "[T]ribal governments have been quick to realize the central importance of control over the decision-making process—that is, the government with power to set water quality standards for reservation streams controls the future water quality of the reservation. **Permitting, inspecting, and the taking of civil or criminal action against reservation polluters are necessary control functions, but the overriding factor on which all other activities depend is the preliminary decision as to what the water quality of reservation waters should be. . . . For tribal governments . . . the overarching question has become one of whether the states or the tribes should make those political decisions balancing economic interests against interests of human health and public welfare on the reservations.**" Price, B. Leigh, Jr., "Tribal Programs Under the Clean Water Act: Regulatory Design Considerations," *Mineral Development on Indian Lands*, Paper No. 16, at 16-8 (Emphasis added.)

that the rationale for this decision applies to other areas of jurisdictional dispute both under the Clean Water Act ("CWA"), 33 U.S.C. §§ 1251-1387 (1997), (for example the Tribes have an application pending for recognition of their sovereignty to regulate wetlands) and in other realms of regulatry control, so that, based on this precedent, they will be subject directly to the regulatory control of the Tribes in other areas.[4]

B. The Districts.

In 1908, Congress amended the FAA, in furtherance of the Dawes Act policies, (*see Montana*, 450 U.S. at 559, n.9), and authorized the construction of an irrigation project to serve all the irrigable land on the reservation, whether an allotment (which under the FAA became alienable after a period in trust) or unallotted homestead land. Act of May 29, 1908, 35 Stat. 448, at section 15. In 1926, to further construction on this Project, Congress authorized the formation and operation of the Districts under State law in the Act of May 10, 1926, Ch. 277, 44 Stat. 453, 464. Congress authorized the Districts to embrace within their boundaries and authoriites all fee-owned irrigable lands, including trust allotments once the fee patent has issued. As owners of

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[4] The Court previously considered review of the Ninth Circuit decision applying the legal concept at issue here on the Flathead reservation and finding the Tribes retained jurisdiction to regulate nonmember conduct over land, the south half of Flathead Lake, the circuit had found the Tribes own. *Confederated Salish and Kootenai Tribes v. Namen*, 665 F.2d 951 (9th Cir. 1982), *cert. denied*, 459 U.S. 977-981 (1982). (Rehnquist, C. J. and White, J. dissenting, arguing: "The 'ownership' and 'regulatory' issues present important questions having ramifications throughout the many western states within the jurisdiction of the Court of Appeals for the Ninth Circuit. I would grant certiorari to review that court's decision of both issues.")

irrigable land, each of the individual *amici* is a constituent of one of the three Districts.

Under Montana law, the Districts' authority includes, *inter alia*, the power to construct and maintain dams and reservoirs and other diversions for irrigation works,[5] appropriate water, acquire land, water rights, and water works, enter contracts with the United States, apportion and distribute irrigation water among irrigators, and operate the irrigation project which serves them. *See* Ch. 85, Title 7, Part 19, Montana Code Annotated (1997). The Flathead Joint Board of Control serves as a central operating authority for these Districts and, like the Districts, is a governmental entity under Montana law. § 85-7-1905, MCA.

As local governmental entities of the State which Congress specifically authorized to operate under State law, the Districts interest here is in preventing the disruption of the direct political relationship, and accountability, between their constituents, the Districts, and the State by the intrusion into this relationship of the Tribal governments' authority. The extension of the Tribes' authority to cover water quality matters pertaining to fee lands not only undermines the Districts' authority and the Districts' governmental relationship with the State but it also subjects the great majority of the Districts' constituents who are not tribal members to an unaccountable government in which neither they nor the Districts have any formal right or role. *See United States v. Lopez*, 514 U.S. 549, 577 (1995), citing *New York v. United States*, 504 U.S. 144, 155-163 (1992) and *FERC v. Mississippi*, 456 U.S. 742, 787, (1982) (O'Connor, J., concurring in part and

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[5] The Court found diversions of water, even for nonconsumptive uses, could be limited because of their impact on water quality standards in *PUD No. 1 v. Washington Department of Ecology*, 511 U.S. 700 (1994).

dissenting in part). There, the Court noted "[t]he . . . inability to hold either branch (state or federal) of the government answerable to the citizens is more dangerous even then devolving too much authority to the remote central power." *Id.* (Explanatory parenthetical added.) This is precisely what occurs when a tribal government controls nonmember activity on nontribal land.

C. The National Water Resources Association.

The National Water Resources Association (NWRA) is a not-for-profit federation of water resource organizations in sixteen (16) of the seventeen (17) reclamation states. Its membership includes rural water districts, municipal water entities, and other local governments. Many of these members are Publicly Owned Treatment Works ("POTWs"), which receive wastewater from indirect dischargers, treat it, and then discharge it into navigable waters. Consequently, they must meet applicable water quality standards to receive the certification required under § 401 of the CWA. Some of its members are commercial water supply companies and legal and financial institutions concerned with permitting and financing water supply and treatment facilities.

Among its members are municipal water supply and waste water treatment agencies, POTWs, and rural water districts located on Indian reservations throughout the West. Also among its members are irrigation districts located on Indian reservations in Washington, Oregon, Montana, Wyoming, Nevada and Idaho.

NWRA works for policies that promote the conservation, enhancement, and efficient management and use of water. NWRA advocates laws and regulations that balance the use of water and land resources to meet existing and future needs of the people in their local circumstances with the interests of preserving and enhancing a clean environment. The development of such policies and proj-

ects to meet future needs requires a degree of certainty about regulatory regimes so that meaningful planning, interms of legal and financial support for developments as well as engineering, can take place.

NWRA formally supports, by resolution, the continued development of tribal water quality programs within their sphere of jurisdiction. It does not support the extension of tribal authority over nonmembers and their activities on non-tribal land, primarily because nonmembers have no right to participate in tribal governments. In view of the critical importance of water and, particularly in the West where water is scarce, the fundamental social issues control of water use involves, NWRA strongly supports governmental authority over water use that is accountable to all citizens. Lacking political accountability to nonmembers, Tribal sovereign authority to govern water use by nonmembers will, in NWRA's view, alienate nonmembers and leave them disaffected from the entire process, making it more difficult to develop and particularly to implement sound policies promoting wise use of water.

Aside from any particular resolution to this controversy, NWRA is strongly interested in having the issue of whether tribes have sovereign authority to set standards for nonmember activity on fee land resolved so that its members can plan accordingly in terms of the political regime they will have to work within, the level of standards they will have to meet, and the capital input that will be necessary, should they decide to proceed with further development.

SUMMARY OF ARGUMENT

The issue presented here flows not from a discretionary act of EPA but from the result of its mandatory obligation to make a legal determination whether, under the second *Montana* exception, the Tribes retain inherent sovereign authority to set water quality standards for the entire reservation. The Ninth Circuit's affirmance of this

decision on a *de novo* review conflicts with applicable principles established by the Court in *Montana*, 450 U.S. 544 (1981), *Brendale*, 492 U.S. 408 (1989), *South Dakota v. Bourland*, 508 U.S. 679, (1993), and *Strate v. A-1 Contractors*, —— U.S. ——, 117 S.Ct. 1404 (1997). Moreover, this decision conflicts, in principle if not directly, with decisions of other circuits and lower courts that have analyzed and applied the exception. Finally, the Ninth Circuit's decision to uphold EPA's application of the exception in this case will have broad and deep consequences. Tribes throughout the country will be found to possess inherent sovereign authority for a broad range of "health and welfare" issues under EPA's simplistic analysis. On reservations where nonmembers reside, the extension of tribal authority in this manner will cut deeply into the most fundamental rights and liberties of U.S. citizens.

REASONS FOR GRANTING THE PETITION

I. THE NINTH CIRCUIT'S DECISION PRESENTS THE CLEAN LEGAL ISSUE WHETHER A TRIBE'S INHERENT SOVEREIGNTY EXTENDS TO NONMEMBER CONDUCT ON FEE LAND THAT DOES NOT DIRECTLY AFFECT THE TRIBE'S ABILITY TO GOVERN ITS INTERNAL MATTERS.

1. The Tribes cast EPA's decision as having merely been just another discretionary decision in its implementation of § 518, under which, incidentally, it treats tribes as the "functional equivalent of states." Tr. Bf. 2. Consequently, the Tribes claim the State's request for review from this Court, backed by eleven (11) other states, proceeds from a "fabricated argument that the TAS decision is predicated upon EPA's erroneous interpretation of the doctrine of inherent Tribal sovereign powers." *Id.* at 10. This downplaying of EPA's decision seriously misreads the records, including the Tribes' own submissions.

2. EPA's rulemaking process and the preamble to the final rules dealt extensively with how EPA would determine whether an applicant tribe possessed sovereign power to carry out the program for which it sought TAS. Pet. 92a-110a. The first document in the administrative record for the TAS decision at issue here consists of thirty-eight (38) pages from the Tribes' application explaining the scope of their jurisdiction, particularly over nonmembers. AR1, esp. 54-85. In their application, the Tribes asserted:

> "It is presently unquestioned that, unless expressly divested by Congress, tribal governments have 'police powers' to safeguard the health, safety, and cultural and social welfare of tribal members by regulation of activities and conduct, and to regulate the use of lands on Federal Indian reservations by all persons to promote the health, safety and welfare of the tribes. These police powers of Tribes are grounded in Tribal inherent sovereignty . . . ." AR1, 54.[6]

On this erroneous basis, the Tribes claimed, "[i]nherent tribal sovereignty forms the basis for the territorial jurisdiction of an Indian tribe over its reservation . . . ." AR4, 37. In reviewing this claim and finding the Tribes possess such sovereign power, EPA plainly understood that its decision was whether or not the Tribes possessed such inherent sovereign authority. EPA's decision document stated: "The Agency is satisfied that the . . . Tribes . . .

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[6] The Tribes filed a special addendum to their application on July 13, 1993, one month after the Court's decision in *South Dakota v. Bourland*, 508 U.S. 679 (1993). Concerned that EPA might view *Bourland*, which addressed tribal regulatory jurisdiction over nonmembers on an opened reservation like the Flathead reservation, as relevant and adverse to their assertion of sovereign authority in this case, the Tribes argued the *Bourland* decision "while potentially detrimental to Tribal regulatory authority based solely on inherent sovereign authority . . . bolsters Tribal authority when, as in this case, Congress delegates authority under the CWA to Tribes." AR11.

have adequate jurisdiction to set water quality standards for waters within the exterior boundaries of the Reservation . . . ." Pet. 60a.

In its decision upholding EPA's decision, the Ninth Circuit clearly understood its task was to determine the legal question whether EPA had properly "delineated" the second *Montana* exception and found the Tribes possess inherent sovereignty on that basis. Pet. 11a-12a. The Circuit court's *de novo* review and approval of EPA's legal determination of the Tribes' jurisdiction on the basis of that exception is squarely presented for review here.[7]

II. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF THIS COURT AND IT CONFLICTS IN PRINCIPLE IF NOT DIRECTLY WITH DECISIONS OF OTHER CIRCUITS.[8]

1. "[A]bsent express authorization by federal statute or treaty, tribal jurisdiction over the conduct of nonmembers exists only in limited circumstances." *Strate*, 117 S.Ct. at 1409.[9] The Court has required that for a

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[7] The Ninth Circuit held no deference is due EPA's ruling on this legal issue (Pet. 11a). "[T]he scope of inherent tribal authority is a question of law for which EPA is entitled to no deference. . . . EPA's delineation of the scope of that standard . . . has nothing to do with its own expertise or with any need to fill interstitial gaps in the statute. . . ." Review of this ruling has not been sought here.

[8] In *United States v. Johnson*, 481 U.S. 681, 685 (1987), the Court granted *certiorari* to review the "reformulation" of one of its doctrines by the Ninth Circuit Court of Appeals and to resolve a conflict among the circuits, including a "conflict[] in principle." *Id.* at 685, n.4. The Court also granted *certiorari* to the Ninth Circuit in *Oregon Department of Fish annd Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 764 (1985), to resolve an apparent "conflict in principle" with the Eighth Circuit.

[9] That there is no federal statute or treaty basis for the Tribes' authority here was not questioned by EPA or the lower courts. By rule, EPA determined the statute did not delegate authority to Tribes. Pet. 111a. Neither the Tribes nor EPA argued any treaty provision supplies the source of the Tribes' claimed sovereignty.

Tribe to possess retained inherent sovereign authority over such nonmember conduct "in limited circumstances" it must demonstrate that the conduct directly, adversely affects the tribe's ability to govern itself. *Id.* at 1416. The Court explained the scope of such self government by specifying four areas the nonmember conduct must adversely affect to trigger a Tribe's inherent sovereignty: its power to punish tribal offenders, determine tribal membership, regulate domestic relations among members, and prescribe rules of inheritance for members. *Id.*

The Ninth Circuit's decision ignores these limitations. It approved EPA's decision that, after only a "minimal showing" that water is present on the reservation and tribal members use water, it may "presume," Pet. 105a-106a, the tribe has jurisdiction to set quality standards because nonmember conduct may affect **tribal members** (not the Tribe itself). Yet neither EPA nor the Tribes demonstrated how matters of water quality impact the Tribes' powers of self-government to punish tribal offenders, determine tribal membership, regulate domestic relations among members, or prescribe rules of inheritance.

2. Moreover, the Court has clearly stated that the broad police power to regulate water quality is beyond the scope of tribal power over nonmembers it enumerated in *Strate*. *See Brendale,* 492 U.S. at 429, and n.11 (tribes do not have police power); *United States v. Lopez,* 514 U.S. 549, 566-68, (1995) (police power reserved by Constitution to States.); *Id.* at 552 ("constitutionally mandated division of authority 'was adopted by the Framers to ensure protection of our fundamental liberties.' ") (Citation omitted.) This is a fundamental barrier to finding tribal jurisdiction in this case, Respondents' desire for which cannot "take precedence over the Constitution." *Seminole Tribe of Florida v. Florida,* 517 U.S. 44, 168, (1996) (dissent of Stevens, J.) As the Court held in *Lopez* in a different context, "[t]o uphold the Government's contentions here, would [be] to pile inference upon

inference in a manner that would bid fair to convert (tribal) authority under (their retained inherent sovereignty) to a general police power of the sort retained by the States." *Lopez*, 514 U.S. at 567. (Parentheticals added.)

3. But, even assuming Tribes could possess such police power, in justifying its decision, Pet. 12a, the Ninth Circuit also ignored the fact that the Court has found against tribal jurisdiction over nonmembers in cases presenting conceptually similar issues—i.e. whether a tribe has authority over nonmember activity on fee land that has mobile effects and whether "checkerboard jurisdiction" is permissible. *See Montana*, 450 U.S. 566; *Brendale*, 492 U.S. at 430-431, and *see South Dakota v. Bourland*, 39 F.3d 868 (8th Cir. 1994). EPA linked the issues of "mobile effects" and checkerboard jurisdiction in its final rules and said they justified finding Tribal, not State, jurisdiction over nonmember land. Pet. 102a-103a.

Contrary to this, "in *Montana*, *Brendale*, and *Bourland* the Court 'authorized such 'checkerboard' jurisdiction by mandating that neighboring tracts of land be subject to different regulatory authorities on the basis of the type of ownership, or the nature, of the land." *Lower Brule*, 917 F. Supp. at 1448, quoting *South Dakota v. Bourland*, 949 F.2d 984, 996 (8th Cir. 1991), affirmed *Lower Brule Sioux Tribe v. State of South Dakota*, 104 F.3d 1017, 1024 (8th Cir. 1997). For example, in *Montana*, the Court rejected tribal jurisdiction over nonmember hunting and fishing on and from fee land. The effects of such activity, which impact water and migratory fish and game populations, are clearly mobile. Yet this gave the Court no pause because the place of the activities and the persons conducting them are fixed, determinable facts. In *Bourland* the Court also had no hesitation in holding the Tribe's jurisdiction had been abrogated, even though the effects of nonmember hunting and fishing clearly cross land ownership boundaries. Even in *Brendale*, the Court

held the Tribes at issue lacked jurisdiction to zone nonmember land in an open area even though the effects of land use—industrial, commercial, residential—are not restricted to that parcel of land. There are predictable, migratory effects that come from particular land uses. For example, the aestheic effect of a use of land is not limited to that parecl. Nor are the effects of the various discharges into the air or water or onto the land from particular uses allowed by zoning laws limited to that parcel. Thus, while the land at issue in *Brendale* was, obviously, not mobile, the effects of the nonmember conduct on that land were.

4. Finally, EPA's reliance on legislative findings unrelated to § 518 of the CWA, added 15 years after Congress made the findings, as the foundation for its decision only compounds its error of using after-the-fact documentation [10] to support its decision. *See Lopez*, 514 U.S. at 563. ("[I]mportation of previous findings" inappropirate because they do not speak to the subject matter of the provision they are used to justify.)

Without the use of these "findings" to establish, under EPA's reasoning, the presumption of tribal jurisdiction over nonmember activity, EPA's list of examples of nonmember pollution is insufficient, not least because EPA excluded any person or entity from participating in the administrative process save for the State of Montana, other federal agencies, and other Indian tribes.[11] More

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[10] *See* Petition at 9 and brief of eleven *amici* States at p. 4, n.2, noting the chronology of EPA's documentation of factual support for its finding in this case and in other cases.

[11] This administrative exclusion was circumvented, somewhat, by means of sending comments to the State which then submitted them unchanged to EPA. As a result, in the adminisrative record at tab 20 there are many letters and a petition, signed by hundreds and perhaps thousands of reservation residents, expressing opposition, on fundamental constitutional grounds, to a finding that the Tribes have jurisdiction over them. As a legal matter, however, this exclu-

specifically, this list of examples is unpersuasive because EPA's reasoning fails to consider that the Tribes' 4,000 members, as well as the 17,500 other people living on the reservation, are now and have been since the passage of the CWA in 1972 under the protection of and subject to the standards and programs of that Act, just like the rest of the United States. EPA's decision depicts the reservation as having no regulatory controls protecting water quality, subjecting the Tribes and their members to unrelieved and unconstrained water pollution. That is inaccurate. The Tribes and their members are, in fact, protected, as all United States residents are, by the nationally applicable federal standards and, where applicable —i.e. nonmember fee land—state standards which meet or exceed these minimums. EPA failed to explain how, given these regulatory regimes, which Congress and the Montana legislature deem adequate to protect the citizenry, the health and welfare of the Tribes could be imperilled.

5. The Ninth Circuit's decision also conflicts in principle, if not directly, with decisions of other Circuits and lower courts that have applied the second *Montana* exception in similar circumstances, though not dealing specifically with TAS decisions of EPA. Contrary to the Ninth Circuit, these courts recognized that the tribe asserting sovereign power must demonstrate, in the "necessary particularized inquiry," (*Lower Brule*, 104 F.3d at 1023), that the nonmember conduct at issue directly, adversely affects the Tribe, not just tribal members. Moreover, the requisite effect on the tribe, according to these courts, unlike the Ninth Circuit, must be to powers of self-government—the tribe's political integrity, economic security, or health and welfare, as the Court outlined initially in *Montana*. Finally, these Courts, unlike the Ninth Circuit, recognized that these effects must affect the tribe's powers of self-government not "in general"

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sion had the effect of preventing any person or entity other than the State from obtaining judicial review of EPA's decision.

but "in purely intramural matters." *See Lower Brule*, 104 F.3d at 1022-1024 (finding tribe failed in its second *Montana* showing after the "necessary particularized inquiry" to demonstrate nonmember hunting and fishing of "migrating game populations," even though "vexatious," presents a "direct threat to the welfare of the Tribe as a whole," and " 'checkerboard' jurisdiction had been authorized by the Supreme Court)[12]; *State of South Dakota v. Bourland*, 39 F.3d 868, 869-870 (8th Cir. 1994), on remand from *South Dakota v. Bourland*, 508 U.S. 679, (1993) (rejecting claim of inherent sovereignty based on direct effect from nonmember hunting and fishing, including adverse effect on game populations, because such effects "do not amount to a direct effect on the political integrity, the economic security, or the health or welfare of the Tribe as a whole. . . ."); *Yankton Sioux Tribe v. Southern Missouri Waste Management District*, 890 F. Supp. 878, 889 (D.S.D. 1995) (limited and somewhat contradictory evidence "regarding impact of the proposed municipal solid waste landfill on the political integrity, economic security, or health and welfare of the Tribe" fails to give rise to tribal sovereignty)[13]; *Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174, 178-179 (2d Cir. 1996) (analyzing the second *Montana* exception in determining whether OSHA applies to a tribal business the Second Circuit rejects as "too grandiose a concept of

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[12] *And see* dissent of Beam, Circuit Judge, arguing, as the Ninth Circuit held here, the second *Montana* exception provides for tribal sovereignty when the nonmember conduct has any effect on the Tribes' members, the same reasons advanced in his dissent from the Circuit's decision in *Strate v. A-1 Contractors*, 76 F.3d 930 (8th Cir. 1996), which this Court rejected in affirming the en banc circuit decision. *Strate, supra.*

[13] The Tribe did not appeal this ruling. Therefore, it was not at issue in the Court's reversal of the Eighth Circuit's affirmance of the district court that the Yankton Sioux reservation had not been diminished. *South Dakota v. Yankton Sioux Tribe*, —— U.S. ——, 118 S.Ct. 789 (1998).

tribal sovereignty" the argument that any activity that involves tribal entities or people necessarily involves and is subject to only the tribes' sovereignty and casts the issue raised by the second *Montana* exception as "not whether the statute affects tribal self-governance **in general** but rather whether it affects tribal self-governance **in purely intramural matters.**") (Emphasis in original.)

These courts have read and applied the Courts' decision more narrowly and precisely than the Ninth Circuit. The principles of their decisions conflict with those of the Ninth Circuit's and this conflict warrants resolution by the Court.

III. THE SCOPE OF EPA'S RATIONALE APPLIES NATIONWIDE AND IF ALLOWED TO STAND WILL RESULT IN SIGNIFICANT ABRIDGEMENT OF FUNDAMENTAL RIGHTS OF NONMEMBERS TO PARTICIPATE IN GOVERNMENTS UNDER WHICH THEY LIVE.

The impact of the Ninth Circuit's decision is nationwide, Pet. 135a-146a, and it penetrates into the delicate balance between the state and federal sovereigns devised in the Constitution. Hundreds of Tribes have applied for the same treatment from EPA. Indeed, Tribes this Court has ruled lack jurisdiction over nonmembers for regulatory programs very similar to the programs at issue here as to the legal issues they raise concerning tribal jurisdiction over nonmembers will be deemed to have such jurisdiction by EPA under the rationale it applied in this case.[14] The significant incursion on the values of Fed-

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[14] *Compare* TAS approvals for Confederated Tribes and Bands of the Yakama Indian Nation, Pet. 145a, with *Brendale*, 492 U.S. 408 (1989); and for Crow Tribe, Pet. 140a, with *Montana*, 450 U.S. 544 (1981); Also *Compare* TAS approval for Yankton Sioux Tribe, Pet. 141a, with *Yankton Sioux Tribe v. State of South Dakota*, 890 F. Supp. 878, 888 (D.S.D. 1995); and TAS approval for Lower Brule Tribe, Pet. 141a, with *Lower Brule Sioux Tribe v. State of South Dakota*, 104 F.3d 1017, 1022-24 (8th Cir. 1997).

eralism and the fundamental liberties it secures, *Lopez*, 514 U.S. 549, 552, is confirmed by both the assertions of the Tribes and the approval of EPA. The Tribes explicitly grounded their assertion of such authority on their claim to possess "police powers," (AR1, 54), giving them "territorial jurisdiction," (AR4, 37), throughout reservation land. Approving this claim, EPA explicitly grounded its decision on the basis that Tribes retain such "core governmental functions" "to protect public health and safety." (Pet. 104a.) This ranges far beyond the powers of self-government the Court has found tribes retained upon incorporation into the United States. *Strate*, 117 S.Ct. at 1416. Tribes' sovereignty may fit comfortably within the constitutional framework when limited to their members. But when it is extended to embrace police powers, which the Constitution reserved to states, and to nonmembers, whose fundamental rights and liberties are not secured when they are properly within a tribe's jurisdiction, it raises significant questions regarding the place of sovereign tribes within our federal structure.

Finally, the depth of the mischief wrought by the Ninth Circuit's decision, cannot be overstated in regard to the rights of individuals who are not tribal members but who lawfully reside and own land within an Indian reservation. Should the Ninth Circuit's decision pass unreviewed, their disenfranchisement from the government which enacts water quality standards applicable to the water they use would be replicated throughout the United States. *See* Pet. 135a-146a. As noted by EPA, setting water quality standards is a "core governmental function." Such functions, in our system, are properly taken by a government accountable to the people subject to its decisions. If Tribes have sovereign authority over nonmembers for such "core governmental functions" such accountability, and the values it preserves, will be lost.

Such unaccountable government is reason, and has been since the incubation of this Nation in the toils of unrepresentative government, for grave concern.

CONCLUSION

The Court should grant the petition for certiorari.

Respectfully submitted,

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